Before the
Federal Communications Commission
Washington, D.C. 20554

IN THE MATTER OF	)	
	)	
	)	**WC Docket No. 04-313**
Unbundled Access to Network Elements	)	
	)	**CC Docket No. 01-338**
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these initial comments in response to the August 20, 2004 released *Order and Notice of Proposed Rulemaking* (*Interim Order and NPRM*), FCC 04-179, 69 Federal Register 55128 (September 13, 2004) seeking input on a variety of issues related to the development of final network unbundling rules. NARUC[1] is a quasi-governmental nonprofit organization, founded in 1889, that represents government officials in all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with overseeing the operations of telecommunications providers operating within their respective jurisdictions.

NARUC limits its initial comments to three areas.

- The FCC should give substantial deference to NARUC's member comments.
- The FCC should reverse the apparent findings in the FNPRM that seem to either (i) limit State authority to set lower prices for existing elements pursuant to State law or (ii) establish uniform increases in prices for elements if the FCC fails to issue a permanent rule.
- NARUC generally agrees with the FCC that: "[b]ased on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected."

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[1] Both the U.S. Congress and federal courts have recognized that NARUC is a proper party to represent the collective interests of State regulatory commissions. See, e.g., 47 U.S.C. §410(1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. Cf, 47 U.S.C. § 254 (1996). See, also, *USA v. Southern Motor Carrier Rate Conference, et al.,* 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See, also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982).

I. The FCC should give substantial deference to NARUC member's comments.

NARUC's member commissions are not like other parties to this proceeding. No other parties to this proceeding have, like the FCC's commissioners, the sworn duty to act in the public interest. No other parties to this proceeding have been directly charged by Congress with specific duties under the federal act to enhance universal service, promote the deployment of advanced services, and advance competitive entry. Moreover, much of the record that will be available for the FCC's consideration was compiled in the first instance by (and also will be submitted by) NARUC's member commissions. Accordingly, NARUC urges the FCC to give substantial deference to its members' comments.

II. The FCC should reverse the apparent findings in the FNPRM that seem to either (i) limit State authority to set lower prices for existing unbundled elements pursuant to State law or (ii) establish uniform increases in prices for elements if the FCC fails to issue a permanent rule by the end of the year.

Absent further FCC action on remand finding that access to switching or "enterprise market loops and/or dedicated transport" is impaired within six months, Paragraph 29 of the *Interim Order and NPRM* purports to unilaterally increase the actual State-set rates by a uniform amount. The order also purports to limit State authority to price rates lower that current levels in Paragraph 2.[2] While it is not clear, Chairman Powell's concurring opinion indicates that the FCC is seeking comment on at least one aspect of these proposals. According to the Chairman, under the order ". . .there are no automatic price increase after 6 months for facilities providers. Today's Order only seeks comment on a transition that will not be necessary if the Commission gets its work done."

While the Supreme Court found in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (*Iowa*) that the Act is "not a model of clarity," two things were clear: (1) when interconnection agreements are negotiated, they are to be submitted to State commissions for approval, but if negotiations fail, "either party can petition the State commission . . . to arbitrate

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[2] See, *Interim Order and NPRM* , ¶ 2, mimeo at page 2: "These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements."

open issues." 525 U.S. at 373-374, and (2) with respect to rates established in such arbitrations "[i]t is the States that will . . . determine[] the concrete result in particular circumstances."[3]

Both the Act and Supreme Court precedent make clear that State actions, like rate-setting, undertaken in the context of an arbitration must be upheld as long as they are (i) consistent with any applicable FCC pricing methodology, (ii) designed to enhance Congress's goal of promoting competitive entry,[4] (iii) established pursuant to specific State authority reserved under 47 U.S.C. § 252(d), (iv) based on record evidence, and (v) carry out the specific role Congress delegated to the States in 47 U.S.C. § 252.

There is *no* provision in the Act that allows the FCC to usurp final State-pricing authority.

Moreover, the FCC's proposal to raise rates uniformly after six months is – on its face – arbitrary and capricious. The prices established by the States for elements range widely.[5] In some cases – the initial rate in one state, after an increase via the FCC's formula, could end up being close to if not equivalent to the initial pre-FCC increase rate in another State or even in another zone in the same State. The FCC nowhere provides any rationale to justify the amount of the increase.

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[3] *Iowa*, 525 U.S. at 384 ("[Section] 252(c)(2) entrusts the task of establishing rates to the State commissions . . . It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.").

[4] Section 251(d)(3) permits the States to establish regulations that do not conflict with the requirements of section 251, and expressly precludes the FCC from impeding State regulations. The declaration of State authority in this section is expressly noted and is not a grant of delegated authority that the Commission can usurp through declaratory ruling by taking action outside of its narrowly-tailored preemption authority contained in section 253(d). Section 251(d)(3) by its definite terms does not require all State access and interconnection regulations to be coextensive with the FCC's regulations published under section 251. Section 251(d)(3)(C) prevents the States from adopting regulations that would "substantially prevent" the opening of the ILEC's networks to competitive carriers under the Commission's orders. Section 251(d)(3) reveals explicit Congressional intent to preserve State authority to adopt pro-competitive regulations, even where the Commission has not done so. In fact, in the *Iowa Util. Bd v. FCC* (120 F.3d 806) arbitration, the Eighth Circuit Court of Appeals held that section 251 (d)(3) "constrains the FCC authority" to preempt State access and interconnection obligations.

[5] See, e.g., *Survey of Unbundled Network Element Prices in the United States* by Billy Jack Gregg, Consumer Advocate, West Virginia PSC (August 2004) available online at http://www.nrri.org.

III. *NARUC generally agrees with the FCC that: "[b]ased on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected."*

In paragraph 13 of the FNPRM, the FCC also specifically incorporates, for comment, "… three petitions regarding incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no section 251(c)(3) unbundling obligation."

Section 252(a)(1) requires carriers to submit negotiated interconnection agreements to state commissions for approval pursuant to section 252(e). In prior orders, the FCC has broadly construed this requirement, finding that "any 'agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).'" *Qwest Corp. Apparent Liability for Forfeiture*, File No. EB-03-0IH-0263, ¶ 22 (rel. March 12, 2004) (FCC 04-57) (*Qwest NAL*) (citation omitted).

NARUC generally agrees with the FCC that: "Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected." *Qwest Declaratory Ruling* ¶¶ 10-11.[6]

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[6] See, *Qwest NAL at* ¶ 34, where the FCC states: "After an agreement is filed with a state commission, . . . [t]he state commission can advise the carrier whether a certain type of agreement is considered an interconnection agreement that requires filing in that state. Until an agreement is filed, however, the state commission would not be in a position to approve, reject, or determine whether a certain type of agreement does not require filing."

III. CONCLUSION

For the foregoing reasons, NARUC requests that the FCC (i) give substantial deference to NARUC's member comments, (ii) reverse the apparent findings in the FNPRM that seem to either limit State authority to set lower prices for existing elements pursuant to State law or establish uniform increases in prices for elements if the FCC fails to issue a permanent rule, and (iii) reaffirm that State commissions ". . . are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected."

Respectfully Submitted,

James Bradford Ramsay
GENERAL COUNSEL
Grace Delos Reyes
ASSISTANT GENERAL COUNSEL
National Association of
Regulatory Utility Commissioners
Washington, D.C. 20005
(202) 898-2207 (telephone)
(202) 898-2213 (facsimile)

It is true the FCC has recognized a handful of narrow exceptions to this filing requirement: (1) agreements addressing dispute resolution and escalation provisions, to the extent that the information is generally available to carriers, (2) settlement agreements, (3) forms used to obtain service, and (4) certain agreements entered into during bankruptcy. *Qwest NAL* ¶ 23. With respect to "settlement agreements," the FCC made clear that this exception encompasses only agreements that provide for "backward-looking consideration," for example, in the form of a cash payment or cancellation of an unpaid bill. To the extent that a settlement agreement resolves disputes that affect an incumbent LEC's ongoing obligations under 251, that agreement – whether labeled a "settlement agreement" or not – must be filed for approval. *Qwest Declaratory Ruling*, 17 FCC Rcd 19337, ¶ 12 (2002). In several recent cases, some companies have sought to file only discrete portions of interconnection agreements – claiming the rest were "commercial" agreements or otherwise subject to an FCC recognized exception. Where any part of an agreement is subject to filing and State approval, it is difficult to understand how a State can make the findings Congress required without seeing the entire agreement. In the Act, States are charged with determining whether -- "the agreement or a portion thereof - discriminates against a telecommunications carrier not a party to the agreement." 47 U.S.C. § 252(e)(2)(A) (1996). States cannot make this required "discrimination" evaluation without seeing ALL the "consideration" offered in the entire document - aka - favorable conditions in one part of the contract may be offset by other "consideration' in other aspects of the agreement. Arguably, any approach that only makes part of an interconnection agreement available for review - writes the standard for approval out of the statute.